BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CLYDE B. ARMSTRONG	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 261,043
KANSAS DEPARTMENT OF TRANSPORTATION	)	& 261,044
Respondent	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Both claimant and respondent appeal the April 22, 2002 Award of Administrative Law Judge Bruce E. Moore. Claimant contends that the Administrative Law Judge's award of a 35 percent permanent partial general body disability is inadequate, as claimant is permanently and totally disabled from any substantial gainful employment or, in the alternative, has a work disability substantially in excess of that provided by the Award. Respondent, on the other hand, contends that claimant's award is excessive and that the 35 percent permanent partial general disability does not take into account the fact that claimant grossly misrepresented his condition, as evidenced by the videotape of claimant taken on July 17, 2001. The Appeals Board (Board) held oral argument on October 23, 2002.

APPEARANCES

Claimant appeared by his attorney, Timothy M. Alvarez of Kansas City, Missouri. Respondent and its insurance carrier appeared by their attorney, Richard L. Friedeman of Great Bend, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

(1) Did claimant suffer accidental injury arising out of and in the course of his employment on the date or dates alleged?

(2) Did claimant provide timely notice of accident in Docket No. 261,043 for an accident date of December 11, 1998?

(3) What is the nature and extent of claimant's injury and/or disability? The parties dispute the Administrative Law Judge's finding regarding claimant's wage and task loss under K.S.A. 1998 Supp. 44-510e, with respondent alleging claimant did not put forth a good faith effort to find employment and further alleging that the task analysis of P. Brent Koprivica, M.D., is flawed.

(4) Should claimant's vocational expert's opinion be excluded from the record?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board finds as follows:

Claimant, an Equipment Operator II for respondent, had been performing those activities for at least 10 years. On December 11, 1998, while driving a box drag tractor, filling out washouts, he was forced to twist to the side and look behind him. After doing this for several hours, claimant got off the tractor, in significant pain, forcing him to have to lie down on the ground. The pain in claimant's low back caused him to seek treatment with Bill Eastus, D.C., a local chiropractor. The workers' compensation questionnaire filled out by claimant on December 12, 1998, indicated that he suffered an injury while driving a tractor, experiencing pain in his low back and hip. Claimant's treatment with Dr. Eastus was brief. He continued performing his activities with respondent without accommodation. This is the subject of Docket No. 261,043.

On January 25, 1999, while stepping out of a truck, claimant stepped into a washed out area approximately 6 to 8 inches deep. He again experienced major back pain with pain shooting down his right leg. After the December 1998 accident, claimant advised his supervisor, Mark Shumway, of his injury. After the January 25, 1999 incident, claimant reported his problems to Sharon Dobson. He sought medical treatment on that same day. Claimant was referred to several physicians, being prescribed physical therapy, epidural injections and spinal taps. He also underwent several tests, including MRIs, CT myelograms and x-rays. This is the subject of Docket No. 261,044.

He was ultimately referred to William M. Shapiro, M.D., who performed a discectomy on May 13, 1999. He was also being treated by Jose G. Amayo, M.D., who on April 17, 2000, assigned him a 10 percent whole person impairment, with specific restrictions against lifting greater than 20 pounds and recommendations that he be limited to sedentary physical activities. Maxine A. Lingurar, M.D., in her May 9, 2000 note, specifically restricted claimant from repetitive twisting and indicated he could not hold any weights away from his body and was unable to hold his arms overhead for more than just a few minutes.

Claimant had returned to work for respondent for several days, performing light duty. However, due to pain, he was unable to complete the light-duty assignments, even though they were within the restrictions placed upon him by the doctors.

Respondent was later unable to accommodate the restrictions placed upon claimant. A June 13, 2000 letter from E. Dean Carlson, Secretary of Transportation, to claimant indicated that, as the restrictions were not able to be accommodated, claimant was being dismissed from his employment with respondent.

After leaving respondent, claimant applied for and was awarded Social Security disability. At the time of the regular hearing, claimant was not working. He described ongoing pain which prohibited him from sitting or standing longer than 45 minutes at a time and which forced him to lie down on more than one occasion every day. Claimant testified his physical activities were very limited, as he could not continue to do vacuuming or yard mowing as he had done in the past. Claimant did testify that over a period of several months, he applied at approximately fourteen different places of employment.

On March 17, 2001, claimant was referred to P. Brent Koprivica, M.D., for an examination. This examination was at the request of claimant's attorney. Dr. Koprivica limited claimant to sedentary physical activities and assessed claimant a 40 percent whole person impairment pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). Dr. Koprivica felt claimant to be realistically, permanently and totally disabled as a result of the injury suffered with respondent.

At the deposition of Dr. Koprivica, his testimony took a radical turn when he was provided a videotape of claimant, taken July 17, 2001. Dr. Koprivica acknowledged the activities displayed in the videotape were substantially different than those displayed by claimant when he was being examined. During the physical examination, claimant stood with a stooped posture and had a significant limp on the right side. His gross lumbar flexion was limited to 15 degrees and he had a substantially abnormal gait. Dr. Koprivica diagnosed failed back syndrome from this examination. After reviewing the videotape, Dr. Koprivica recanted his failed back syndrome diagnosis and testified claimant was not permanently and totally disabled. He raised his lifting restrictions from 20 pounds to 50 pounds, and acknowledged that claimant might possibly be able to increase the weights to 70 pounds, although Dr. Koprivica did not go so far as to adopt that weight limitation.

Dr. Koprivica had earlier been provided the task loss analyses provided by Michael Dreiling and Karen Crist Terrill. He found claimant incapable of performing seven of the eight tasks on Mr. Dreiling's list, for an 88 percent task loss. He found claimant incapable of performing twenty-five of the thirty tasks on Ms. Terrill's list, for an 83 percent task loss. Dr. Koprivica's testimony does not make clear whether he took into consideration the videotape in testifying regarding claimant's ability to perform the tasks contained on both Mr. Dreiling's and Ms. Terrill's lists. In reviewing the task lists, there appear to be tasks that claimant could perform within the new limitations of Dr. Koprivica, but Dr. Koprivica does not testify to those in detail.

Claimant was referred for an examination at the request of respondent's attorney with C. Reiff Brown, M.D., a retired orthopedic surgeon. Dr. Brown, who is board certified in orthopedic surgery, currently spends his time performing evaluations for attorneys and for administrative judges. He testified that at the time of his examination, claimant did have a limp which he described as varied in severity. He found claimant's lumbar flexion to be 50 degrees, with extension of 20 degrees, and right and left flexion 20 degrees, all of which would be considered slightly limited. After reviewing the videotape, he felt claimant was able to fully flex without limitation as that was the range of motion displayed by claimant on the videotape.

At the regular hearing, claimant testified that he could only stand or sit for 45 minutes at a time. Dr. Brown confirmed that there was no medical basis for either of those restrictions. As far as bending and stooping, he did not feel the necessity to place medical limitations on claimant.

Dr. Brown assessed claimant a 10 percent functional impairment pursuant to the AMA *Guides* (4th ed.), describing claimant's loss as being contained in the DRE lumbosacral category III radiculopathy. He acknowledged that some time in the past claimant had objective radiculopathy which is why he was placed in category III. He testified there was no medical basis for claimant's being listed in DRE category IV, which was the category ultimately relied on by Dr. Koprivica. Dr. Koprivica had initially placed claimant in DRE category VI, after he diagnosed failed back syndrome.

Dr. Brown also stated that based upon a review of the videotape, claimant's physical activities were much greater activity-wise than he had been led to believe.

Dr. Brown was also provided the job task list prepared by Ms. Terrill. He testified claimant was unable to perform five of the thirty tasks on the list, for a 17 percent loss of tasks. In reviewing the task list prepared by Mr. Dreiling, he found claimant incapable of performing two of the eight tasks, for a 25 percent task loss.

In workers' compensation litigation, it is claimant's burden to persuade the trier of facts by a preponderance of the credible evidence that claimant's position on an issue is

more probably true than not true on the basis of the whole record. Claimant must establish this burden by a preponderance of the credible evidence.[1]

In order for a claimant to collect workers' compensation benefits under the Workers Compensation Act, he must suffer an injury arising out of and in the course of his employment.

> The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[2]

> The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service.[3]

Claimant's description of the accidents on December 11, 1998, and January 25, 1999, are uncontradicted in the record.

Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy.[4]

The Board finds that claimant has proven that he suffered accidental injury on both December 11, 1998, and January 25, 1999, with his injuries arising out of and in the course of his employment with respondent.

Respondent contends claimant failed to provide timely notice of accident for the December 11, 1998 accident. Again, claimant's is the only testimony in the record dealing with this issue. K.S.A. 44-520 (Furse 1993) requires notice of accident be given to the employer within ten days of the date of accident. In this instance, claimant testified that he told his supervisor, Mr. Shumway, that he had "messed his back up" and he needed to go to the doctor. He even stated that his supervisor gave him a ride into town to claimant's vehicle so that he could seek medical treatment. This testimony is uncontradicted and not

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[1] *See* K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

[2] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[3] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984).

[4] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

shown to be untrustworthy. The Board, therefore, finds that claimant provided timely notice of accident pursuant to K.S.A. 44-520 (Furse 1993).

With regard to claimant's accident of December 11, 1998, there is no medical opinion in the record regarding what, if any, functional impairment claimant may have suffered from that accident. The Board, therefore, finds that claimant's accident of that date resulted in only a temporary injury to claimant's back, with no resulting permanency.

With regard to the nature and extent of claimant's injury from the accident of January 25, 1999, the Board finds that the functional impairment opinion of Dr. Brown, assessing claimant at 10 percent impairment to the body as a whole utilizing DRE lumbosacral category III from the AMA *Guides* (4th ed.), is the most credible evidence in the record. The Administrative Law Judge's finding in this regard is, therefore, affirmed.

K.S.A. 1998 Supp. 44-510e defines permanent partial disability as:

> [T]he extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

The record contains two task lists for consideration. The first, prepared by vocational expert Michael Dreiling, displays eight tasks. The second, created by vocational expert Karen Crist Terrill, contains thirty tasks. Both task opinions were considered by Dr. Koprivica. However, it is obvious from Dr. Koprivica's deposition that his opinion regarding claimant altered dramatically after viewing the videotape. Where Dr. Koprivica originally discussed claimant's failed back syndrome and concluded claimant suffered a permanent and total disability, after viewing the videotape, he assessed claimant a 20 percent impairment, down from the original 40 percent and modified his restrictions from 20 pounds lifting up to 50 pounds and possibly 70 pounds. In reviewing Dr. Koprivica's testimony regarding the various task lists, it is unclear whether Dr. Koprivica modified his task loss opinion after taking into consideration this videotape. Certain of the tasks which appear to fall within the 50-pound limitation set by Dr. Koprivica continued to be excluded without sufficient explanation. The Board finds the opinion of Dr. Koprivica sufficiently unclear as to cast doubt upon the validity of his task loss opinion.

Dr. Brown, in reviewing the task list of Ms. Terrill, found claimant to be incapable of performing five of the thirty tasks contained in the list, for a 17 percent task loss. After reviewing Mr. Dreiling's list, Dr. Brown found claimant to be incapable of performing two of the eight, for a 25 percent task loss. The Board finds neither Mr. Dreiling's nor Ms. Terrill's task list to be more credible or sufficiently persuasive as to eliminate

consideration of the other. The Board, therefore, finds in considering both that claimant has suffered a task loss of 21 percent.

Regarding what, if any, wage loss claimant has suffered, the Board must first consider respondent's contention that claimant has violated the principles set forth in *Foulk*[5] and *Copeland.*[6]

In *Foulk*, the Kansas Court of Appeals held that a worker could not be awarded benefits for refusing a proffered job that the worker had the ability to perform. In this instance, light duty was offered to claimant which, in his testimony, he was unable to perform due to pain. While there is some doubt cast upon claimant's credibility due to the videotape, there is no persuasive evidence that claimant rejected a job he had the ability to perform. The restrictions in place at the time of claimant's termination prohibited him from performing those duties and further prohibited respondent from being able to accommodate claimant. The Board, therefore, finds the principles set forth in *Foulk* do not apply.

However, the Court of Appeals, in *Copeland*, held that if a worker, post injury, does not put forth a good faith effort to obtain employment, then the trier of facts is obligated to impute a wage based upon the evidence in the record as to claimant's wage-earning ability.

Here, claimant has not only ceased looking for work, he has applied for and is receiving Social Security disability. The job attempts described by claimant at the regular hearing, in the Board's opinion, did not constitute a good faith effort at obtaining employment. The fact that claimant has terminated his attempts to find employment is additional support for the Board's determination that a good faith effort has not been made in this instance. Finally, after reviewing the videotape, the Board finds it incredible that claimant would be incapable of performing any type of work, especially taking into consideration the physical activities displayed by claimant in that videotape. The Board, therefore, finds claimant has not put forth a good faith effort to obtain employment since leaving respondent. The Board will, therefore, impute a wage to claimant pursuant to K.S.A. 1998 Supp. 44-510e.

Claimant argues that Mr. Dreiling opined claimant was capable of earning $7 to $8 per hour in the open labor market and that opinion should be adopted for the purposes of computing a post-injury wage. A review of Mr. Dreiling's testimony indicates that was merely Mr. Dreiling reciting claimant's comments to him regarding the level of job claimant

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[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

was seeking. That did not constitute an opinion on Mr. Dreiling's part regarding claimant's wage-earning ability.

The Administrative Law Judge found Ms. Terrill to be the only expert to offer an opinion regarding claimant's post-injury wage-earning abilities. Ms. Terrill found claimant capable of earning between $450 and $500 per week based upon the restrictions set forth by Dr. Brown. The Board agrees. The Administrative Law Judge averaged those figures, computing an ability wage of $475 per week, which the Board adopts. Comparing this to claimant's average weekly wage of $591.81 for the January 25, 1999 date of accident, claimant has a wage loss of 20 percent.

Averaging the 21 percent task loss and the 20 percent wage loss, the Board finds claimant has suffered a 20.5 percent permanent partial general disability for the injuries suffered on January 25, 1999.

The Board acknowledges that Dr. Koprivica attributed claimant's impairment to the first accident. However, as noted by the Administrative Law Judge, claimant continued performing his regular duties until the January 25, 1999 accident. Additionally, the Board finds that the opinion of Dr. Koprivica is substantially clouded due to the obvious misunderstanding of claimant's physical limitations, or lack thereof, which resulted during Dr. Koprivica's examination of claimant. The Board finds that the disability in this instance stems from the accident of January 25, 1999.

The Board, therefore, finds that claimant is entitled to an award of only medical treatment for the injuries suffered with respondent on December 11, 1998. Claimant is denied additional temporary or permanent compensation for that accidental injury.

With regard to the injury of January 25, 1999, claimant is entitled to a 10 percent functional impairment, followed by a 20.5 percent permanent partial general disability and based upon an average weekly wage of $591.81.

AWARD

Docket No. 261,043

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated April 22, 2002, should be modified to award claimant his medical benefits for the accident of December 11, 1998, including any past medical benefits incurred and any unauthorized medical for which claimant has provided itemization, but claimant is denied future medical for the injuries of December 11, 1998. Additionally, claimant is denied any temporary or permanent compensation for that accident.

Docket No. 261,044

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated April 22, 2002, should be modified with regard to the above findings and an award is granted in favor of the claimant, Clyde B. Armstrong, and against the respondent, Kansas Department of Transportation, and the State Self-Insurance Fund, for injuries occurring on January 25, 1999, for a 20.5 percent permanent partial general disability.

Claimant is entitled to 58.87 weeks temporary total disability compensation at the rate of $366 per week totaling $21,546.42, followed by 76.08 weeks permanent partial disability compensation at the rate of $366 per week totaling $27,845.28, for a total award of $49,391.70.

As of the date of this award, the entire amount would be due and owing in one lump sum minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of November 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy M. Alvarez, Attorney for Claimant
Richard L. Friedeman, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Director, Division of Workers Compensation